NO. 34107-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ANTHONY RENE VASQUEZ,

Defendant/Appellant.

BRIEF OF APPELLANT

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3. The aggravating factor of drive-by shooting, as it pertains to Count 1, first degree murder, does not apply based on the contradictory special verdict. The rule of lenity precludes its application to a repugnant verdict. (Instruction 13 and 14; Verdict Form A; and Special Verdict Form 1; Appendices "E," "F," "G," and "H")

4. Paragraph 4.1 of the Judgment and Sentence contains inconsistent language and must be corrected in connection with the firearm enhancement of sixty (60) months.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Does Count 6 of the Third Amended Information charge a crime, when it refers to "another person, any person other than Nancy Harrison,

M.*P. and Juan Jesus Garcia," for purposes of the offense of drive-by shooting?

2. Did the State prove, beyond a reasonable doubt, each and every element of the offense of drive-by shooting as charged in Counts 4, 5 and 6?

3. Does the aggravating factor of drive-by shooting, as set forth in RCW 10.95.020(7), apply to the charged offense of first degree murder when the general verdict form and the special verdict form contain contradictory findings as to alternatives (one of which is repugnant to the statutory language of RCW 10.95.020)?

4. Does the rule of lenity apply to repugnant/contradictory verdicts of an alternative means offense?

5. Does paragraph 4.1 of the Judgment and Sentence need to be corrected since it references a sixty (60) month firearm enhancement as both in addition to and included within the life without parole sentence?

STATEMENT OF THE CASE

Juan Garcia was the front seat passenger in a GMC Envoy parked at the Airport Minimart Grocery on September 17, 2013. Nancy Harrison, a.k.a. Nancy Hernandez, his girlfriend, was in the driver's seat. Her son,

M.P., was in the rear passenger seat sitting behind Mr. Garcia. (Bartunek RP. 615, ll. 22-23; RP. 617, l. 12 to RP. 618, l. 5; RP. 618, ll. 17-24; RP. 634, l. 22 to RP. 635, l. 4)

The passenger side window on the Envoy was rolled down approximately halfway. Ms. Hernandez saw an individual with a gun approach the passenger side of the Envoy. He raised the gun and shot Mr. Garcia in the head. Ms. Hernandez later identified the person as Mr. Vasquez. (Bartunek RP. 620, ll. 14-15; RP. 924, ll. 1-16; RP. 927, ll. 14-25)

Larry Godden was driving past the minimart when he heard a shotgun blast. He looked in that direction and saw a person running back to a pickup (PU) and carrying a pistol grip shotgun. He followed the PU as it left the area and called 911. (Bartunek RP. 567, ll. 4-11; RP. 571, ll. 18-20; RP. 572, ll. 5-17; RP. 573, ll. 1-2)

The PU, a Toyota, was parked on the side of the building at the minimart. The PU was later located and seized. Velia Gilbert, the mother of Alejandro Manzo, identified the PU as hers. Mr. Manzo was the driver of the PU on September 17, 2013. (Bartunek RP. 569, ll. 17-20; RP. 575, ll. 22-24; RP. 679, l. 20 to RP. 680, l. 13; RP. 780, ll. 7-8; ll. 13-16)

Monica Echeverria was dating Mr. Vasquez at the time. She was the backseat passenger in the Toyota PU. She heard a loud bang and then saw Mr. Vasquez return to the PU. He said "I got him." She recalled Mr.

Vasquez had a gun with him when he returned to the PU. (Bartunek RP. 674, ll. 7-11; RP. 677, ll. 7-10; RP. 678, ll. 11-12; ll. 18-21; RP. 681, ll. 5-7)

Deputy Ball responded to the minimart following the 911 call. Mr. Garcia had a severe head wound. He was obviously dead. (Bartunek RP. 701, ll. 24-25; RP. 703, ll. 11-15; RP. 704, ll. 11-25; RP. 705, ll. 4-10)

Mr. Vasquez was arrested by U.S. Marshals on September 21, 2013 in Spokane. (Bartunek RP. 879, ll. 2-9; RP. 881, ll. 1-24)

Mr. Vasquez's cellphone was found in the Toyota PU. (Bartunek RP. 1135, l. 13 to RP. 1136, l. 9)

Fingerprints were obtained from the Toyota PU. DNA swabs were taken from Mr. Manzo and Mr. Vasquez. Stephen Greenwood of the Washington State Patrol Crime Lab (WSPCL) swabbed the inside of the PU for potential DNA. (Bartunek RP. 647, ll. 1-4; RP. 648, ll. 2-4; RP. 649, ll. 9-18; RP. 901, ll. 17-20; RP. 905, ll. 4-6; RP. 907, l. 25 to RP. 908, l. 2; RP. 909, l. 15 to RP. 910, l. 6; RP. 912, l. 20 to RP. 913, l. 2)

Scott Redhead of the WSPCL did fingerprint comparisons with regard to Mr. Manzo and Mr. Vasquez. Their prints were inside the Toyota PU. (Bartunek RP. 1038, ll. 7-8; RP. 1046, ll. 17-21; RP. 1047, ll. 13-19; RP. 1048, ll. 5-11; RP. 1049, ll. 1-13; RP. 1051, ll. 19-20)

Anna Wilson of the WSPCL conducted the DNA analysis. She located DNA attributable to Mr. Manzo and Mr. Vasquez on beer cans which were found inside the Toyota PU. (Bartunek RP. 1061, ll. 4-6; l. 9; RP. 1071, ll. 15-17; RP. 1073, l. 21 to RP. 1074, l. 2)

Ms. Echeverria advised officers that Mr. Manzo threw the shotgun into a metal shed. The officers searched the shed on September 17 but were unable to locate the shotgun. They eventually found the shotgun on October 7 outside the Dean Evans residence at 4301 Ottmar #20. The prior search had been in the metal shed at #28. (Bartunek RP. 679, l. 20 to RP. 680, l. 13; RP. 857, ll. 6-9; RP. 859, l. 21 to RP. 860, l. 1; RP. 978, ll. 3-22; RP. 989, ll. 5-10; RP. 990, l. 2-16)

Detective Green located the gun in an area that had been searched on the prior occasion. Mr. Evans confirmed that his house had been searched previously. (Bartunek RP. 861, l. 20 to RP. 862, l. 20; RP. 999, ll. 5-19)

The shotgun, when recovered, had a shell jammed in it. There was one (1) spent round and two (2) live rounds. The shotgun was test fired at the WSPCL and it was determined that the shotgun had fired the spent shell located in it. (Bartunek RP. 992, ll. 6-23; RP. 1020, ll. 9-11; RP. 1032, ll. 11-24)

Johan Schoeman, who test fired the shotgun, also compared the wadding from the unfired shells with the wadding recovered during the autopsy of Mr. Garcia. The wadding was comparable to a Winchester 12 Gauge short shell. (Bartunek RP. 1024, ll. 8-15; RP. 1029, ll. 11-23)

The live rounds located in the shotgun contained slugs. A slug weighs approximately four hundred and thirty-nine (439) grains. The fragments obtained during the autopsy weighed four hundred and eighteen point seven (418.7) grains. (Bartunek RP. 1030, ll. 11-24)

There were no fingerprints on the shotgun. Mr. Manzo was excluded as a contributor to DNA located on the shotgun. The analysis concerning Mr. Vasquez's DNA was inconclusive. DNA from at least four (4) individuals was on the shotgun. (Bartunek RP. 1041, ll. 19-24; RP. 1068, ll. 3-9; RP. 1070, ll. 19-21; RP. 1070, ll. 19-22; RP. 1070, l. 25 to RP. 1071, l. 1; RP. 1041, ll. 19-24)

An Information was filed on September 19, 2013 charging Mr. Vasquez with first degree murder under Count 1; second degree murder under Count 2 and unlawful possession of a firearm in the second degree under Count 3. (CP 1)

An Amended Information was filed on October 8, 2013. It added an alternative of extreme indifference to the first degree murder charge.

Count 2 was amended to second degree felony murder based upon second degree assault. (CP 13)

Mr. Vasquez's jury trial was initially scheduled for November 20, 2013. Multiple continuances were granted for a variety of reasons. (CP 10; CP 20; CP 22; CP 23; CP 25; CP 26; CP 27; CP 28; CP 39; CP 46; CP 47; CP 48; Steinmetz RP. 74, ll. 23-25; RP. 138, ll. 16-17)

The State filed a Second Amended Information on March 17, 2015 adding a firearm enhancement to Counts 1 and 2; adding felony murder alternatives to Counts 1 and 2; adding three (3) counts of drive-by shooting (Counts 4; 5 and 6) and one (1) count of witness tampering. (CP 32)

On March 17, 2015 the State also issued an aggravated sentence notice. (CP 37)

A Third Amended Information was filed on October 20, 2015. Count 2, second degree felony murder, was amended to reflect multiple alternatives for underlying felonies including the drive-by shootings. Count 6 alleged a drive-by shooting involving unknown and unidentified individuals. (CP 52)

The State and the defense agreed on multiple stipulations for purposes of trial. The Court read the following stipulations to the jury:

- Juan Garcia died from a shotgun wound to the head which occurred at close range.

- Metal fragments and wadding removed at the time of the autopsy are admissible.
- Mr. Vasquez has a previous felony conviction which is applicable only to unlawful possession of a firearm second degree.
- Mr. Vasquez, Mr. Manzo and Mr. Garcia were all gang members having specific gang monikers.
- Monica Echeverria's interview occurred in October 2014.
- Mr. Vasquez has an LVL tattoo on his neck.

(CP 108; CP 110; CP 112; CP 114; CP 125; Bartunek RP. 774, l. 16 to RP. 775, l. 23; RP. 1130, ll. 11-20)

Mr. Vasquez moved to dismiss Count 2 and Counts 4, 5 and 6. The trial court denied the motions. (CP 475; Bartunek RP. 1201, l. 1; RP. 1229, l. 21 to RP. 1230, l. 9; RP. 1239, l. 11; Steinmetz RP. 225, ll. 1-7; RP. 227, ll. 9-20)

Mr. Vasquez objected to the drive-by shooting instruction for Count 6. (Bartunek RP. 1108, l. 16 to RP. 1109, l. 3; RP. 1109, ll. 23-24)

The jury returned verdicts of guilty on all seven (7) counts. The jury also determined by special verdict that Mr. Vasquez committed first degree murder under each of the alternatives; the aggravating factor of drive-by

shooting applied; the firearm enhancement applied; all alternatives to second degree murder were established beyond a reasonable doubt, as were all alternatives to the tampering charge except withholding information from law enforcement. (CP 237; CP 238; CP 239, CP 240; CP 241; CP 242; CP 243; CP 244; CP 245; CP 246; CP 247; CP 248)

Mr. Vasquez filed a motion to arrest judgment and for a new trial on November 25, 2015 as to the drive-by shootings. (CP 253)

On January 14, 2016 he filed a motion to arrest judgment as to the drive-by aggravator, or in the alternative, to dismiss it. (CP 256)

Judgment and Sentence was entered on February 4, 2016. The trial court dismissed Count 2 due to the fact that it constituted double-jeopardy. Mr. Vasquez was sentenced to life in prison without possibility of parole plus sixty (60) months for the firearm enhancement. All counts were to run concurrent. (CP 452)

Mr. Vasquez filed his Notice of Appeal on February 9, 2016. (CP 482)

SUMMARY OF ARGUMENT

Count 6 of the Third Amended Information does not charge a crime. The State failed to prove, beyond a reasonable doubt, each and every element of the offense of drive-by shooting. It is based upon speculation.

Counts 4, 5 and 6 are based on the questionable premise that the discharge of the firearm was within the immediate area of the PU which brought Mr. Vasquez to the scene. The distance from the PU to the scene of the discharge was not within the immediate area due to a building in between the two (2) vehicles and the roundabout approach made by Mr. Vasquez to the Envoy. The evidence is insufficient to support all elements of drive-by shooting.

If the drive-by shooting offenses are reversed due to insufficient evidence, then the State's use of drive-by shooting as an aggravating factor precludes a life without parole sentence. Moreover, the inconsistent jury verdicts on Count 1 require, under the rule of lenity, that Mr. Vasquez's conviction be based on the alternative means of extreme indifference as opposed to premeditation.

Under the facts and circumstances the sixty (60) month firearm enhancement was erroneously imposed on the life without parole sentence.

ARGUMENT

I. DRIVE-BY SHOOTING

A. Count 6

Count 6 of the Third Amended Information states:

> On or about the 17th day of September, 2013, in the State of Washington, the above named Defendant did, recklessly discharge a firearm as defined in RCW 9.41.010 in a manner which created a substantial risk of death or serious physical injury to another person, **any person other than Nancy Harrison, M.*P. and Juan Jesus Garcia,** and the discharge was either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter and/or firearm to the scene of the discharge; contrary to the Revised Code of Washington 9A.36.045.

Mr. Vasquez asserts that the language set forth in Count 6 fails to charge an offense based upon the facts and circumstances of the case. The charging language essentially amounts to pure speculation.

QUERY: How is Mr. Vasquez to know if any other person was in the area where the firearm was discharged?

The failure of the State to identify a specific individual in the charging language of Count 6 deprived Mr. Vasquez of his constitutional right to

understand the nature of the charge against him in accord with Const. art. I, § 22.

Const. art. I, § 22 provides, in part:

> In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof ... [and] to meet the witnesses against him face to face ....

The foregoing provision encompasses what is denominated the essential elements rule. The rule and its purpose are clearly delineated in *State v. Nonog,* 169 Wn.2d 220, 226, 237 P.3d 250 (2010):

> The information must allege every element of the alleged offense. *State v. Vangerpen,* 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The law imposes this requirement so "that the accused may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense." *State v. Leach,* 113 Wn.2d 679, 688, 782 P.2d 552 (1989). Failure to allege each element means that the information is insufficient to charge a crime and so must be dismissed. *Vangerpen,* 125 Wn.2d at 788, 795. By longstanding precedent, the defendant may bring a constitutional challenge to the information at any time before final judgment. [Citations omitted.]
>
> The elements need not be alleged in the exact words of the statute so long as the information alleges the elements of the crime in terms equivalent to or more specific than those of the statute. *Leach,* 113 Wn.2d at

> 686, 689. **More than merely listing the elements, the information must allege the particular facts supporting them.** *Id.* at 688. The requirement is to charge in language that will "apprise an accused person with reasonable certainty of the nature of the accusation." *Id.* at 686. Failure to provide the facts "'necessary to a plain, concise and definite statement'" of the offense renders the information deficient. *See id.* at 690 ....

(Emphasis supplied.)

The language of Count 6 would not preclude the State from bringing an additional prosecution against Mr. Vasquez for a subsequently discovered individual who may have been in the area of the discharge of the firearm. By using the language that it did, the State told Mr. Vasquez that there was another person in the area and that he would have to discover who that was. If he could not discover who it was, then tough luck.

Mr. Vasquez moved to dismiss Count 6. The trial court denied it. The reasoning behind the motion for dismissal was clearly stated by defense counsel.

> MR. GONZALES: I would suggest to the court that your Honor has pointed out the exact issues that the defense would point out. It's overbroad, there's no specific person who is not identified in a different count. There is

> -- there's no showing of any immediate danger at all. And the presumption would be that there would have to be some indifferent act. One shot was fired, and the facts of the matter are that the one shot basically went one place only. So there was no opportunity to endangerment for other persons. And there were no named persons at all. I mean no one was shown to be doing anything at all about that. And I think it is simply too vague, overbroad and doesn't state an appropriate criminal activity to proceed to the jury, your Honor.

(Bartunek RP. 1232, ll. 10-24)

As set forth in *State v. Zillyette,* 178 Wn.2d 153, 158, 307 P.3d 712 (2013):

> ... The essential elements rule is grounded in the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. ...; *see also* CrR 2.1(a)(1) ("[T]he information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."). "We review allegations of constitutional violations *de novo.*" *State v. Siers,* 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012).

> "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." *State v. Ward,* 148 Wn.2d 803, 811, 64 P.3d 640 (2003) (quoting *State v. Johnson,* 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). ...

Detective Wallace testified that there were houses and businesses in the area around the minimart where the shooting occurred. However, there was no indication that there was any unidentified person present near where the shotgun was discharged. (Bartunek RP. 1132, ll. 11-24)

The prosecuting attorney, in closing argument, stated that the drive-by shootings occurred and that insofar as Count 6 is concerned

> ... the third one is about endangering anyone else. I'd point out that you had houses, you had cars going up and down. Larry Godden, he testified that he was driving, basically even with the car when the shot went off. **That shot misses, goes through the car, anything can go and hit somebody.** That's recklessly endangering them and putting them at substantial risk of death or serious physical injury. It's a drive-by shooting.

(Bartunek RP. 1308, ll. 2-10) (Emphasis supplied.)

The argument clearly reflects the totally speculative and conjectural underpinnings of Count 6. It does not charge a crime and it was not established by the State that a crime was committed.

B. Counts 4, 5 and 6

Count 4 charged Mr. Vasquez with drive-by shooting and named Nancy Harrison (Hernandez) as the alleged victim.

Count 5 charged Mr. Vasquez with drive-by shooting and named M.*P. as the alleged victim.

Count 6 is discussed in detail in the preceding portion of the brief.

Mr. Vasquez contends that the State failed to prove, beyond a reasonable doubt, each and every element of the offense of drive-by shooting as to these three counts.

RCW 9A.36.045(1) defines the crime of drive-by shooting as follows:

> A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person **and the discharge is** either from a motor vehicle or **from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.**

(Emphasis supplied.)

What is critical with regard to these offenses is that there was only a single shot. The shot was a slug from a pump style shotgun. The bullet entered Mr. Garcia's head and killed him.

The passenger window on the GMC Envoy was partially down. There was no shattered glass. There was no testimony as to any other damage to the Envoy.

There was no evidence of any bullet fragments located other than in Mr. Garcia's head.

The slug went directly from the shotgun barrel into Mr. Garcia's head. It was a slug; not birdshot which could have scattered throughout the Envoy.

No additional shots were fired. The State did introduce evidence that the shotgun was jammed after the first shot. It would only be speculation that a second or third shot was intended. This is so even though there were two (2) other unspent bullets in the shotgun. No shell casings were located at the scene of the discharge. (Bartunek RP. 1133, ll. 1-3)

Again, the speculative nature of the State's evidence becomes clear in the prosecuting attorney's closing argument.

> ... So we have a little boy in the back seat, we have Nancy Harrison in the driver's seat, we have Juan Jesus Garcia in the passenger seat,

> we have this guy waving around, running, a marginally functional shotgun, are they in danger? **That round, fortunately** -- at least somewhat fortunately -- **stopped inside Juan Jesus Garcia's head. If he had missed, if he hit a different part, if the gun had slipped, any number of things**, you'd have a dead seven year old, you'd have Nancy Harrison dead. **We don't know exactly what could have happened**, but did he endanger them **by coming up and shooting into the car** that they were in **in a rapid fashion**? Yes, he did.

(Bartunek RP. 1306, ll. 7-20) (Emphasis supplied.)

There was no rapid firing. Rapid firing would imply an automatic or semi-automatic weapon.

Everything included in this portion of the prosecuting attorney's argument is pure speculation. A single bullet was fired. The bullet went directly into Mr. Garcia's head.

There may have been fear on the part of Ms. Harrison and her son. The fear may well have supported an assault charge; but it does not support a conviction for drive-by shooting.

In addition to the insufficiency of the evidence with regard to creating a substantial risk of death or serious physical injury, there is also the question of whether or not the discharge occurred within "the immediate area of a motor vehicle" which had transported either Mr. Vasquez or the firearm "to the scene of the discharge."

There can be little dispute that Mr. Vasquez and the firearm arrived near the minimart in the Toyota PU. The more problematic issue is whether the discharge of the firearm occurred within the immediate area of a motor vehicle.

Testimony at trial indicated that the Toyota PU was parked approximately sixty-three (63) feet from where the Envoy was parked. It was on the other side of the grocery store and apparently unobservable by anyone occupying the Envoy. (Bartunek RP. 987, ll. 15-18)

Mr. Godden observed the individual with the shotgun walking around the building. (Bartunek RP. 571, ll. 2-3)

Ms. Echeverria testified that she saw Mr. Vasquez get out of the PU and walk to the area of a little shed where he stood for a period of time. (Bartunek RP. 677, ll. 15-19)

Defense counsel correctly argued that the applicable case to be considered by the trial court was *State v. Locklear,* 105 Wn. App. 555, 20 P.3d 993 (2001), *affirmed in State v. Rodgers,* 146 Wn.2d 55, 43 P.3d 1 (2002). The trial court denied the motion to dismiss.

The *Locklear* case deals with the phrase "immediate area."

The facts in *Locklear* involved the shooter walking a distance of two (2) blocks from a parked car and firing into a residence. The *Locklear* Court held that a two (2) block distance was not within the "immediate area" of the vehicle. The Court ruled at 560-62:

> ... [A] person of ordinary intelligence would *not* know without guessing whether the required nexus exists when a shooter is transported to the scene in a car, *walks two blocks away,* then fires the gun. Although the term "immediate area of a motor vehicle" includes at its core the area within a few feet or yards of the motor vehicle, how is one to know whether it includes a location two blocks away? Although the term "scene of the discharge" includes at its core the area within a few feet or yards of the gun when the gun is fired, how is one to know whether it includes a location two blocks away? A person of common intelligence cannot answer these questions without guessing, and the statute is unconstitutionally vague as applied to this case.
>
> ...
>
> ... [F]or today, however, it is enough to note that a person of common intelligence would

> have no way of knowing, without guessing, whether a citizen who discharges a gun two blocks away from a motor vehicle is discharging the gun "from the immediate area" of the motor vehicle.
>
> Our conclusion also finds support, though only slightly, in the fact that in every Washington drive-by shooting case decided on appeal to date, the shooter fired from inside the car, or from within a few feet or yards of the car. Neither party cites, nor have we found, any case here or elsewhere where the State has attempted to apply a statute that requires a close nexus between shooting and vehicle to facts that show a two block distance in between. ....

The Supreme Court, in *Rodgers,*[1] at 62, ruled:

> It seems obvious that one is not in the immediate area of a vehicle that is parked two blocks away from the place where that person discharges a firearm. That is the case we have here and, thus, we have no difficulty saying that the evidence is insufficient to support the trial court's conclusion of law that *Locklear* was guilty of drive-by shooting. In making this determination, we find it helpful to accord the term "immediate" its dictionary definition, which *Webster's Third New International Dictionary* defines as "**existing without intervening space or substance ... being near at hand: not far apart or distant.**" Similarly, *Black's Law Dictionary* defines "immediate" as **"[n]ot separated in respect to place; not separated by the intervention of an intermediate object."** **BLACK'S LAW DICTIONARY** (6th ed. 1990).

[1] *State v. Rodgers,* 146 Wn.2d 55, 43 P.3d 1 (2002)

> ... In our view, the legislature aimed this relatively new statute at individuals who discharge firearms from or within close proximity of a vehicle. Undoubtedly, it was concern that reckless discharge of a firearm from a vehicle or in close proximity to it presents a threat to the safety of the public that is not adequately addressed by other statutes. A person discharging a firearm two blocks away from a vehicle cannot be said to be in close proximity to that vehicle. To conclude otherwise would be akin to attempting to shove a square peg into a round hole - it does not fit.

(Emphasis supplied.)

There's no evidence that the shotgun was fired from the Toyota PU. The scene of the discharge was on the passenger side of the Envoy.

Testimony indicated that Mr. Vasquez exited the PU, walked behind the store near a fence, waited by a shed, and then came around to the passenger side of the vehicle before firing.

The facts and circumstances do not support that the discharge of the firearm was from the immediate area of the Toyota PU.

II. AGGRAVATING FACTOR

The State charged Mr. Vasquez with first degree murder alleging the alternative methods of premeditation and "extreme indifference."

RCW 9A.32.030(1) provides, in part:

> **A person is guilty of murder in the first degree when**:
>
> (a) **With a premeditated intent to cause the death of another person, he or she causes the death of such person** ....; or
> (b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person ....

(Emphasis supplied.)

In connection with the charge of first degree murder the State alleged the aggravating circumstance of drive-by shooting.

RCW 10.95.020 provides, in part:

> **A person is guilty of aggravated first degree murder ... if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a)** ... and one or more of the following aggravating circumstances exist:
>
> ...
>
> (7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge ....

(Emphasis supplied.)

As can be noted, the crime of aggravated first degree murder is only applicable if it is a premeditated murder.

The jury determined that the murder was both premeditated and committed with "extreme indifference." The special verdict form was unanimous that both alternatives were committed.

There can be no doubt that Count 1 is charged in the alternative. There can be no doubt that the first degree murder charge contains alternative means of committing the crime. *See: State v. Sandholm,* 184 Wn.2d 726, 734 (2015)

Instruction 13 defined the crime of first degree murder in the alternative.

Instruction 14, the to-convict instruction for first degree murder also set out the elements in the alternative.

The fact that the jury unanimously agreed that both alternatives were committed creates a conundrum since only premeditated first degree murder can have the aggravating circumstance applied to it. As noted in *State v. Thomas,* 166 Wn.2d 380, 387, 208 P.3d 1107 (2009):

> ... "[a]ggravated first degree murder is not a crime in and of itself; the crime is '*premeditated* murder in the first degree ... accompanied by the presence of one or more of the statutory aggravating circumstances listed in the criminal procedure title of the code (RCW 10.95.020).'" *Roberts,* 142 Wn.2d [471, 14

> P.3d 713 (2000)] at 501 (quoting *State v. Irizarry,* 111 Wn.2d 591, 593-94, 753 P.2d 432 (1988)). Aggravating factors are not "elements of [a] crime"; they are "'"aggravation of penalty"' factors." *State v. Brett,* 126 Wn.2d 136, 154, 892 P.2d 29 (1995) quoting *State v. Kincaid,*103 Wn.2d 304, 307, 692 P.2d 823 (1985)) ....

Mr. Vasquez takes the position that the verdicts on the alternative means of first degree murder are repugnant to one another. He bases this argument on *State v. Mitchell,* 29 Wn.(2d) 468, 484, 188 P.(2d) 88 (1947) wherein the Court ruled:

> After careful consideration of Rem. Rev. Stat. § 2392, in the light of the authorities bearing on the question here under consideration, we believe that the weight of authority and the better reasoning support the conclusion at which we have arrived, namely, that where the act causing a person's death was specifically aimed at and inflicted upon that particular person and none other, the perpetrator of the act cannot properly be convicted of murder in the first degree under subdivision 2 of Rem. Rev. Stat. § 2392, on the theory that the act was imminently dangerous to others, evincing a depraved mind, regardless of human life, without a premeditated design to effect the death of any individual.

See also: State v. Anderson, 94 Wn.2d 176, 186-92, 616 P.2d 612 (1980).

It is apparent that the verdicts entered by the jury cannot be reconciled. The offense could not be both premeditated and with "extreme indifference."

QUERY: If, in fact, the verdicts are repugnant to one another, should Mr. Vasquez be accorded relief under the rule of lenity?

> ... [T]he rule of lenity dictates that we construe aggravating circumstances narrowly, especially where the application determines the imposition of our most severe penalties, death or life without possibility of release.

State v. Hacheney, 160 Wn.2d 503, 518-19, 158 P.3d 1152 (2007).

Mr. Vasquez is asserting that the rule of lenity should be applied to the alternative means and that he should receive the benefit of it. The conviction must be affirmed under RCW 9A.32.030(1)(b); not (1)(a).

The inconsistency exists as a result of the general verdict form finding Mr. Vasquez guilty of first degree murder. It does not designate any alternatives. Special Verdict Form 1, on the other hand, indicates the jury was unanimous as to both alternatives.

> "'Where the general verdict and the special finding can be harmonized by considering the entire record of the case, including the evidence and the instructions, it is the duty of the court to harmonize them.'" *State v. Burke,* 90 Wn. App. 378, 386, 952 P.2d 619 (1998) (quoting *State v. Eker,* 40 Wn. App. 134, 140, 697 P.2d 273 (1985)).

State v. Duncalf, 164 Wn. App. 900, 908, 267 P.3d 414 (2011)

Mr. Vasquez recognizes that the rule of lenity generally applies to ambiguous statutes. When a statute is ambiguous it is to be resolved in the

defendant's favor. *See: State v. VanWoerden,* 93 Wn. App. 110, 116, 967 P.2d 14 (1998), *review denied,* 137 Wn.2d 1039 (1999).

Mr. Vasquez asserts that there is no difference between an ambiguity in a statute and an ambiguity which is created by the general and special verdicts of a jury. An ambiguity exists in the general and special verdicts in this case due to the fact that the jury was unanimous as to both alternative means of committing first degree murder.

One (1) means of committing first degree murder is with premeditation. The first degree murder charge can be converted to an aggravated first degree murder charge if an aggravating circumstance exists. If the aggravating circumstance exists then a criminal defendant may be sentenced to life in prison without possibility of parole.

On the other hand, where the aggravated first degree murder charge is not limited to premeditation and a jury has also determined that the offense was committed with "extreme indifference" an ambiguity is created because the aggravating circumstance cannot be used to sentence a criminal defendant to life in prison without possibility of parole.

Just as an ambiguous criminal statute cannot be interpreted to increase punishment for a criminal defendant, an inconsistent jury verdict should also be precluded from resulting in an increased punishment. *See: State v. Adlington-Kelly,* 95 Wn.2d 917, 920-21, 631 P.2d 954 (1981)

Alternatively, if the drive-by shooting convictions are reversed, then the aggravator no longer exists. In addition, the aggravator merges since it serves to elevate the offense from a Level XV to a Level XVI offense. (Appendix "I")

III. PARAGRAPH 4.1(a)

Mr. Vasquez's Judgment and Sentence needs to be amended to correctly reflect the firearm enhancement. In two (2) locations within Paragraph 4.1(a) the sentence is life plus sixty (60) months. In one (1) location it states as follows: "The confinement time on Count 1 includes sixty months as enhancement for [X] firearm …."

RCW 9.94A.533(3)(a) authorizes the imposition of an additional five (5) years if a criminal defendant is armed with a firearm at the time of the offense. However, RCW 9.94A.533(3)(g) states:

> If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum offense shall be the presumptive sentence unless the offender is a persistent offender….

Mr. Vasquez is not a persistent offender. He was sentenced to life in prison without possibility of parole. Thus, adding an additional sixty (60) months for the firearm enhancement is not authorized by the statute.

CONCLUSION

Count 6 must be reversed for failure to comply with Const. art. I, § 22. It neither contains all the necessary facts to support a conviction nor does it include all essential elements of the crime of drive-by shooting.

Counts 4, 5 and 6 should be reversed on the basis of insufficient evidence. One shot was fired directly into the head of Juan Garcia. No other person was endangered. The State failed to prove, beyond a reasonable doubt, each and every element of drive-by shooting.

Furthermore, as to Counts 4, 5 and 6, there was insufficient evidence that the discharge occurred within the immediate area of a motor vehicle used to transport the firearm to the scene.

The State's use of drive-by shooting as an aggravating factor precludes a life without parole sentence if the drive-by shooting offenses are reversed.

Moreover, the inconsistent special verdict on Count 1 requires, under the rule of lenity, that Mr. Vasquez's conviction be based on the alternative means of extreme indifference as opposed to premeditation. Mr. Vasquez is entitled to be resentenced accordingly.

DATED this 26th day of June, 2017.

Respectfully submitted,

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APPENDIX "A"

Instruction No. 21

A person commits the crime of drive-by shooting when he or she recklessly discharges a firearm in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge.

APPENDIX "B"

Instruction No. 22

To convict the defendant of the crime of drive-by shooting, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about September 17, 2013, the defendant recklessly discharged a firearm;

(2) That the discharge created a substantial risk of death or serious physical injury to Nancy Harrison;

(3) That the discharge was either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "C"

Instruction No. 23

To convict the defendant of the crime of drive-by shooting, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about September 17, 2013, the defendant recklessly discharged a firearm;

(2) That the discharge created a substantial risk of death or serious physical injury to Mario Pichardo;

(3) That the discharge was either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "D"

Instruction No. 24

To convict the defendant of the crime of drive-by shooting, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about September 17, 2013, the defendant recklessly discharged a firearm;

(2) That the discharge created a substantial risk of death or serious physical injury to any person other than Nancy Harrison, Mario Pichardo or Juan Jesus Garcia;

(3) That the discharge was either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX “E”

Instruction No. 13

A person commits the crime of murder in the first degree when:

A. with a premeditated intent to cause the death of another person, he or she causes the death of such person; or

B. under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person and thereby causes the death of a person.

APPENDIX “F”

Instruction No. 14

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt;

(1) That on or about September 17, 2013, the defendant

(a)(i) acted with intent to cause the death of Juan Jesus Garcia: and

(ii) that the intent to cause the death was premeditated;

or

(b)(i) the defendant created a grave risk of death to another person; and

(ii) the defendant knew of and disregarded the grave risk of death; and

(iii) that the defendant engaged in conduct under the circumstances manifesting an extreme indifference to human life;

(2) That Juan Jesus Garcia died as a result of the defendant's acts; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that either alternative 1(a) or 1(b), and elements 2 and 3 have been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives 1(a) and 1(b) have been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

In order to find that alternative element 1(a) has been proved, you must find that both parts 1(a)(i) and 1(a)(ii) have been proved beyond a reasonable doubt. In order to find that alternative element 1(b) has been proved, you must find that all parts 1(b)(i), 1(b)(ii) and 1(b)(iii) have been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements it will be your duty to return a verdict of not guilty.

APPENDIX "G"

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 13-1-00599-1
	)	
v.	)	VERDICT FORM A
	)	
ANTHONY RENE VASQUEZ,	)	
	)	ORIGINAL
Defendant.	)	
	)	

We, the jury, find the defendant, Anthony Rene Vasquez,

Guilty of the crime of murder in the first degree.
(write in not guilty or guilty)

DATED: 11/16/15

Presiding Juror

APPENDIX "H"

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 13-1-00599-1
v.	)	SPECIAL VERDICT FORM 1
ANTHONY RENE VASQUEZ, Defendant.	)	ORIGINAL

We, the jury, having found the defendant guilty of the crime of murder in the first degree, find the defendant caused the death of Juan Jesus Garcia

1(a) by acting with premeditated intent to cause the death of Juan Jesus Garcia

[X] Unanimously [ ] Not unanimously [ ] no juror found this element beyond a reasonable doubt

1(b) by creating and disregarding a grave risk of death that the defendant knew of and disregarded and that the defendant engaged in conduct under the circumstances that manifested an extreme indifference to human life

[X] Unanimously [ ] Not unanimously [ ] no juror found this element beyond a reasonable doubt.

Joel C. Watkins
Presiding Juror

APPENDIX "I"

OFFENSE SERIOUSNESS LEVELS FOR STANDARD GRID (RCW 9.94A.515)

Seriousness Level	Statute (RCW)	Offense	Class
XVI	10.95.020	Aggravated Murder 1	A
XV	9A.32.055	Homicide by Abuse	A
	70.74.280(1)	Malicious Explosion of a Substance 1	A
	9A.32.030	Murder 1	A
	9A.28.020(3)(a)	Murder 1 – Criminal Attempt	A
	9A.28.040(3)(a)	Murder 1 - Criminal Conspiracy	A
	9A.28.030(2)	Murder 1 – Criminal Solicitation	A
XIV	9A.32.050	Murder 2	A
	9A.28.020(3)(a)	Murder 2 – Criminal Attempt	A
	9A.28.030(2)	Murder 2 – Criminal Solicitation	A
	9A.40.100(1)	Trafficking 1	A
XIII	70.74.280(2)	Malicious Explosion of a Substance 2	A
	70.74.270(1)	Malicious Placement of an Explosive 1	A
XII	9A.36.011	Assault 1	A
	9A.36.120	Assault of a Child 1	A
	70.74.272(1)(a)	Malicious Placement of an Imitation Device 1	B
	9.68A.101	Promoting Commercial Sexual Abuse of a Minor	A
	9A.44.040	Rape 1	A
	9A.28.020(3)(a)	Rape 1 – Criminal Attempt	A
	9A.28.030(2)	Rape 1 – Criminal Solicitation	A
	9A.44.073	Rape of a Child 1	A
	9A.28.020(3)(a)	Rape of a Child 1 – Criminal Attempt	A
	9A.28.030(2)	Rape of a Child 1 – Criminal Solicitation	A
	9A.40.100(2)	Trafficking 2	A
XI	9A.32.060	Manslaughter 1	A
	9A.44.050	Rape 2	A
	9A.28.020(3)(a)	Rape 2 – Criminal Attempt	A

NO. 34107-1-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. ANTHONY RENE VASQUEZ, Defendant, Appellant.	)	GRANT COUNTY NO. 13 1 00599 1 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 26th day of June, 2017, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

COURT OF APPEALS, DIVISION III
Attn: Renee Townsley, Clerk
500 N Cedar St
Spokane, WA 99201

E-FILE

GRANT COUNTY PROSECUTOR'S OFFICE E-FILE
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June 26, 2017 - 7:44 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	34107-1
Appellate Court Case Title:	State of Washington v. Anthony Rene Vasquez
Superior Court Case Number:	13-1-00599-1

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